

MAY 09 2017



ORANGE COUNTY  
**COASTKEEPER**

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May 4, 2017

**VIA CERTIFIED MAIL**

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**Re: Supplemental Notice of Violations and Intent to File Suit Under the Federal Water Pollution Control Act**

Dear Mr. Siegel, Mr. May, and Ms. Ross:

This letter provides notice that Orange County Coastkeeper ("Coastkeeper") intends to file suit pursuant to Section 301(a) of the Federal Water Pollution Control Act ("Clean Water Act," or "CWA"), 33 U.S.C.A. § 1311, against the City of San Juan Capistrano ("City") and Blenheim Facility Management, LLC ("Blenheim") for violating the CWA with regard to unpermitted discharges of pollutants from a point source into waters of the United States.

By letter dated March 31, 2017, and herein incorporated by reference, Coastkeeper notified the City and Blenheim of its intent to sue for CWA violations related to the City's MS4 permit and unpermitted dredge and fill activities in San Juan Creek. This supplemental notice concerns additional CWA violations of which Coastkeeper has become aware. Substantial portions of this letter mirror the March 31, 2017 Notice Letter ("First Notice Letter"). This notice of intent to file suit contains separate and distinct violations not contained in the First Notice Letter.

**1. INTRODUCTION**

The violations at issue are occurring on the City's property located at 27174 Ortega Highway, San Juan Capistrano, California 92675, known as the Rancho Mission Viejo Riding Park at San Juan Capistrano ("Riding Park" or "Facility"). The Riding Park is owned by the City and managed by Blenheim.

This supplemental notice of violations and intent to file suit ("Supplemental Notice Letter") is being sent to you as the responsible owners and operators of the Riding Park (hereinafter referred to collectively as "the Notice Recipients"). The purpose of this letter is to provide notice of the Notice Recipients' CWA violations and to give notice that, after the expiration of sixty (60) days from the date

of this letter, Coastkeeper intends to file a complaint regarding the violations of the Clean Water Act that are occurring at the Riding Park.

In 2016, Coastkeeper received complaints from its members regarding illegal activities taking place in and around the Riding Park in San Juan Capistrano, California. In response to these reports, Coastkeeper conducted an investigation to determine the severity of the problem. During the course of our investigation, Coastkeeper confirmed the Riding Park has more than 500 horses present for more than 45 days per year. Coastkeeper is informed and believes that approximately 2,500 horses circulated through the Riding Park between March 20, 2017 and April 15, 2017. Facilities with more than 500 horses for more than 45 days in a 12 month period are classified as Concentrated Animal Feeding Operations ("CAFOs"). 40 C.F.R. § 122.23. CAFOs are point sources under the CWA. 33 U.S.C.A. § 1362. As point sources, CAFOs may not discharge pollutants to waters of the United States except in compliance with an NPDES permit. 33 U.S.C. § 1311(a). Failure of the Notice Recipients to obtain an NPDES permit for the Riding Park is a violation of Section 301 of the CWA. *See* 40 C.F.R. § 122.21(d)(1).

Horse CAFOs produce a substantial amount of pollutants including manure, bedding, and process wastewater from the horse wash racks. Such animal waste and process wastewater discharged from the Riding Park are and/or contain "pollutants," as defined in CWA Section 502(6), 33 U.S.C.A. § 1362(6) and 40 C.F.R. § 122.2. Manure contains high levels of phosphorus and nitrogen. As a result of unlawful discharges to San Juan Creek, unlawful land application of process wastewater, and stormwater runoff from areas where horse waste is stored, the Notice Recipients have caused and continue to cause discharge of animal waste, nitrates, nitrites, nitrogen, ammonia, phosphorus, bacteria and endotoxin, sulfate and other pollutants into waters of the United States, resulting in substantial harm to public health, welfare and the environment. San Juan Creek is a 303(d) listed impaired water body for several pollutants known to be present at the Riding Park, including phosphorus and nitrogen. Unpermitted discharges from the Riding Park cause and contribute to the impairment of San Juan Creek.

In addition to pollutants typically associated with CAFOs, Coastkeeper is informed and believes that trash and debris are discharged from the Riding Park into waters of the United States. Multiple site investigations reveal ongoing discharges of large trash items, such as feed bags, plastic cups, plastic plant containers, and equestrian medicine applicators into San Juan Creek. In addition to large trash items, the Riding Park is also discharging small, particulate trash from the footing used in the dressage/event rings of the Riding Park. Footing is used in the equestrian event rings to provide cushion for the horses to prevent bone and joint injury. Coastkeeper is informed and believes that the footing used at the Riding Park is a combination of sand, recycled rubber shoes, and other unknown synthetic textiles. Therefore, footing qualifies as a pollutant. During its investigation, Coastkeeper observed footing tracked outside of the event rings and into waters of the United States, and in areas prone to flooding into waters of the United States, a continuous discharge of footing into waters of the United States. These individual examples of failure to comply with the requirements of the Clean Water Act, and those referenced below, are indicative but not exhaustive of activities, or failure to conduct necessary activities, occurring at the Riding Park property in violation of the Clean Water Act.

As set forth in this Supplemental Notice Letter, observations made by Coastkeeper investigators on multiple occasions indicate that the Notice Recipients are and continue to be in violation of the Clean Water Act. Generally, the property owners and/or operators have not obtained a CAFO permit

pursuant to Section 402 of the Clean Water Act, 33 U.S.C.A. § 1342, and have routinely discharged pollutants into San Juan Creek. Each day that pollutants such as manure, process wastewater, trash, and footing are discharged constitutes a separate violation of Section 301 of the Clean Water Act, 33 U.S.C.A. § 1311.

Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the initiation of a civil action against any alleged violator under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), a citizen must give notice of her intent to sue to the discharger, the Administrator of the United States Environmental Protection Agency ("EPA"), the Regional Administrator for the EPA for the region in which such violation is alleged to have occurred, and the Chief Administrative Officer of the water pollution control agency for the State in which the violation is alleged to have occurred. 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R. § 135.2(a)(1). This letter addresses at least 1,825 violations of Section 301 of the Clean Water Act, 33 U.S.C.A. § 1311.

## **2. FACTUAL BACKGROUND**

### **2.1 Orange County Coastkeeper**

Coastkeeper is a nonprofit organization that promotes and restores water resources that are drinkable, fishable, swimmable, and sustainable. Coastkeeper is an environmental group organized as a non-profit corporation in accordance with the laws of the State of California. Coastkeeper's offices are located at 3151 Airway Avenue, Suite F-110, Costa Mesa, California 92626. Coastkeeper is dedicated to protection and preservation, conservation, and restoration of waters, marine habitats and watersheds, through research, education, community action and citizen enforcement. Coastkeeper actively seeks federal and state agency implementation of the Clean Water Act and, where necessary, initiates enforcement actions on behalf of itself and its members.

Coastkeeper and its individual members have an interest in the preservation and use of waters in and around San Juan Capistrano, including, but not limited to the Pacific Ocean, San Juan Creek Mouth, San Juan Creek, and their tributaries. Specifically, Coastkeeper's members sail, swim, picnic, fish, hike, surf, paddle, standup paddleboard, kayak, wade, bike, and enjoy the wildlife in and around these waters, including the reach at issue in this Supplemental Notice Letter. The actions of the Notice Recipients individually, collectively, and in combination with the activities of other landowners adjacent to San Juan Creek, result in numerous injuries to Coastkeeper's interests, such as: loss, destruction or damage to wetlands and waterways; diminished aesthetic enjoyment; increased flooding; loss of open space and habitat for wildlife, including wading birds and federally protected species; degraded water quality; and diminished quality of life. The ability of Coastkeeper's members to engage in such activities and to use and enjoy San Juan Creek is harmed by Notice Recipients' activities.

### **2.2 The City of San Juan Capistrano**

The City of San Juan Capistrano ("the City") is a municipality incorporated under the laws of the State of California. The Department of Public Works & Engineering ("Department") is a department of the City. The City and its Departments have offices at 32400 Paseo Adelanto, San Juan Capistrano, CA 92675. The Department's current Director is Steve W. May. The City's current City Manager is Benjamin Siegel. City and/or the Department are the owner(s) and/or operator(s) of the Riding Park.

The Clean Water Act provides that the owner of the land and operator of the land where operations are taking place is responsible for compliance with the provisions of the CWA. The Riding Park Property is located at 27147 Ortega Highway, San Juan Capistrano, California 92675. Information available to Coastkeeper indicates that the site's Assessor Parcel Number (APN) is 125-172-24, comprises 68.46 acres, and is owned by the City.

In 2010, the City acquired approximately 116 acres currently referred to herein as the Riding Park. In November 2014, the City entered into an agreement with Blenheim Facilities Management, LLC ("Blenheim") to provide management services for the Riding Park commencing on January 1, 2015. Under the terms of the Management Agreement, Blenheim manages approximately 70 acres of the Riding Park.

Pursuant to the terms of the Management Agreement, Blenheim's management term terminated as of 11:59 p.m. on December 31, 2016. On December 6, 2016, the City authorized a month-to-month extension of the Management Agreement for 2017.

### **2.3 Blenheim Facility Management, LLC**

Blenheim Facility Management, LLC is an active Delaware limited liability company with its principal place of business located at 30753 La Pata Avenue, San Juan Capistrano, California 92675. The registered agent for service of process is Rebecca Ross, located at 30753 La Pata Avenue, San Juan Capistrano, California 92675. Blenheim Facility Management, LLC is responsible for management of the Riding Park pursuant to the management agreement with the City of San Juan Capistrano entered into on November 18, 2014, and extended on December 6, 2016.

Blenheim Facility Management, LLC hosts multiple equestrian competitions and shows at the Riding Park throughout the year. Based on a "Notice of Intent to Comply with the Conditional Waivers of Waste Discharge Requirements for Low Threat Discharges in the San Diego Region" submitted by Notice Recipients to the San Diego Regional Water Quality Control Board, there are 127 days where horses are present at the Riding Park. *See* Exhibits A and B. There are 58 days where over 500 horses are present at the Riding Park. *See* Exhibits A and B.

This Supplemental Notice Letter is being sent to the City as the owner the owner/operator of the Riding Park. The Supplemental Notice Letter is addressed to Blenheim as the operator of the Riding Park. Collectively, the City and Blenheim are the owner and/or operators of the property and responsible parties under the Clean Water Act.

### **2.4 San Juan Creek**

San Juan Creek, the receiving water of the pollutants from the Riding Park generally drains towards the south and west with its headwaters in the Santa Ana Mountains. The San Juan Creek watershed encompasses a drainage of approximately 176 square miles and extends from the Cleveland National Forest in the Santa Ana Mountains to the Pacific Ocean at Doheny State Beach near Dana

Point Harbor.<sup>1</sup> The condition of San Juan Creek near the Riding Park is that of a large alluvial valley with an upper terrace dominated by oaks, and a lower, sycamore-dominated terrace with dynamic mulefat and willow communities.<sup>2</sup> An entangling understory of shrubs, flowering plants, and vines provides sites for nesting, shelter and shade for many animals. Algae and mosses proliferate in the water and on rocks. Leaves swept into the current decompose, adding nutrients and organic matter to waterways. Insects thrive here and in turn provide an abundant food source for invertebrates, fish, and birds. (CCC Online Coastal Resources Guide: Streams.) This dynamic creek system promotes maintenance of a compositionally and structurally complex and diverse plant community.<sup>3</sup> As San Juan Creek flows past the Riding Park it mostly consists of an urbanized mixed of commercial, residential, and industrial land uses.<sup>4</sup>

The San Juan Creek watershed extends along an East-West Axis and drains approximately 176 square miles. San Juan Creek meanders through a floodplain with topography typical of coastal creeks and floodplains in Orange County. San Juan Creek is a naturally intermittent stream that presently carries significantly increased flows due to year-round municipal and agricultural return flows and during significant rain events (as evidenced by the considerable flooding during the 2005 winter storms). Waters from San Juan Creek near the Riding Park continue through the City, discharging at the terminus of San Juan Creek at the San Juan Creek Mouth to the Pacific Ocean at Doheny Beach State Park.

Coastal creeks such as San Juan Creek are a precious resource. “On their way to the ocean, California’s coastal streams and rivers flow through the canyons and valleys of coastal mountains, linking forest, chaparral, scrubland, grassland, and marsh. Riparian woodlands develop along stream banks and floodplains, and coastal wetlands and estuaries form where the rivers enter the sea. Rivers transport nutrients, sediments, and oxygen through the watershed, and life flourishes in their path.” *California Coastal Commission's California Coastal Resource Guide*, at <http://ceres.ca.gov/ceres/calweb/coastal/streams.html> (“CCC Online Coastal Resource Guide: Streams”).

In addition, coastal streams such as San Juan Creek serve several important ecological functions including trapping of excess sediment and storing and transforming excess organic matter, preventing it from reaching downstream waters. *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, Sierra Club (September 2003) available at [http://www.sierraclub.org/cleanwater/reports\\_factsheets/](http://www.sierraclub.org/cleanwater/reports_factsheets/). Upstream waters, such as San Juan Creek, where more water makes direct contact with the stream bed, help remove excess nutrients in the water – a problem often associated with urban development and the use of fertilizers on lawns and gardens. The channel shape of coastal streams further facilitates that sequestration and transformation of organic material and sediment.

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<sup>1</sup> U.S. Army Corps of Engineers, South Pacific Div., *Record of Decision for Revoking the Use of Selected Nationwide Permits within the San Juan Creek/Western San Mateo Creek Watersheds for the Special Area Management Plan Orange County, Cal.*, 1 (July 2010).

<sup>2</sup> Smith, Daniel R., Klimas, C.V., U.S. Army Corps of Engineers, Los Angeles Dist., Reg. Branch, *Riparian Ecosystem Restoration Plan for San Juan Creek and Western San Mateo Creek Watersheds: General Design Criteria and Site Selection*, 24 (Aug. 2004).

<sup>3</sup> *Id.* at 16.

<sup>4</sup> *Supra*, fn 1.



Coastal streams and the adjacent estuarine and riparian habitats throughout California also support a wide variety of flora and fauna, including endangered species such as the Pacific pocket mouse, the Southern California Coast Steelhead, the Quino checkerspot butterfly, the southwestern willow flycatcher, and many other species. Portions of San Juan Creek have specifically been identified as critical habitat for a Southern California Coast Steelhead Biogeographic Population Group (“BPG”). The National Marine Fisheries Service’s species Recovery Plan identified threats to Southern California Coast Steelhead DPS restoration efforts in San Juan Creek and concluded culverts were a “very high threat,” and that dams, surface water diversions, and roads are “medium threat” sources.<sup>5</sup> Physical modification of road crossings between estuary and upstream spawning and rearing habitats and the passage of smolts and kelts downstream to the estuary and ocean are specifically identified critical recovery actions for San Juan Creek’s Santa Catalina Gulf Coast BPG of Southern California Steelhead.<sup>6</sup>

San Juan Creek is designated a principal stream system in the San Diego Regional Water Quality Control Board’s Water Quality Control Plan (“Basin Plan”). Pursuant to its authority over designated water bodies, the Regional Board has designated several beneficial uses for San Juan Creek and the water bodies into which they drain.<sup>7</sup> Beneficial uses are intended to represent the purposes of the water body that are specifically protected by the Clean Water Act. When those uses are not attained, the Regional Board designates the water body as impaired under Section 303(d) of the Clean Water Act. In this regard, the receiving waters of pollution from the Riding Park area is impaired. The waters of San Juan Creek downstream of the Riding Park is listed under Section 303(d) as impaired for pollutants including, but not limited to, Indicator Bacteria, Phosphorus, Total Nitrogen as N, Toxicity, DDE, and Selenium. Overall, the San Juan Creek watershed is highly impaired. Thus, the discharge of stormwater carrying the byproducts of the facility, including horse waste, bedding material, feed, metals, trash, footing, and other materials are contributing to, and threatening, San Juan Creek and downstream receiving waters. Similarly, the illegal discharge of non-stormwater, including manure, footing, sediment and other fill material, construction wastes, debris, and other material into San Juan Creek contributes to the impairment of the receiving waters.

San Juan Creek is a water of the United States as defined in the Clean Water Act. The U.S. Army Corps of Engineers defines water of the United States as all waters which are currently used in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, which are used for, among other purposes, the harvesting of fish sold in interstate commerce. 33 C.F.R. § 328.3(a)(1)(i). Waters tributary to these waters are also waters of the United States. *See* 33 C.F.R. § 328.3(a)(5). The waters of the Pacific Ocean at San Juan Creek Mouth are subject to the ebb and flow of the tides. San Juan Creek is tributary to the San Juan Creek Mouth. Therefore, San Juan Creek is a water of the United States.

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<sup>5</sup> National Marine Fisheries Service – Southwest Regional Office, *Southern California Steelhead Recovery Plan Summary*, 18 (Jan. 2012).

<sup>6</sup> National Marine Fisheries Service, *Southern California Steelhead Recovery Plan*, Table 13-3, 13-20 (Jan. 2012).

<sup>7</sup> According to the Basin Plan, San Juan Creek’s existing beneficial uses include: agricultural supply, industrial service supply, contact water recreation, non-contact water recreation, warm freshwater habitat, cold freshwater habitat, wildlife habitat. Likewise, the beneficial uses on the San Juan Creek Mouth, where San Juan Creek meets the Pacific Ocean, includes contact water recreation, non-contact water recreation, wildlife habitat, rare, threatened, or endangered species, marine habitat, migration of aquatic organisms, and shellfish harvesting. *Water Quality Control Plan, San Diego Region*, Regional Water Quality Control Board, San Diego Region, Tables 2-2, 2-3 (updated May 17, 2016).

### 3. LEGAL BACKGROUND OF CONCENTRATED ANIMAL FEEDING OPERATIONS

Section 301 of the CWA, 33 U.S.C.A. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person from a point source except in accordance with certain provisions under the CWA, including the requirement for a discharge to be authorized under Section 402, 33 U.S.C.A. § 1342. The CWA defines a point source as:

“[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, **concentrated animal feeding operation**, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” *Emphasis added.* 33 U.S.C.A. § 1362(14).

To be a concentrated animal feeding operation (“CAFO”) the facility must meet a two-part test. First, the facility must be an Animal Feeding Operation (“AFO”). An AFO is:

“[...] a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

- (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
- (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.” 40 C.F.R. § 122.23.

The EPA considers an animal to be at the facility for a full day if it is at the facility for any portion of a day.<sup>8</sup> This definition includes, for example, “dairy cows that are brought in from pasture for less than an hour to be milked are counted as being confined [...] for the day.”<sup>9</sup> Additionally, the 12-month period is any 12-month period and need not correspond with a calendar year.<sup>10</sup> The EPA further clarifies that crops, vegetation, forage growth, or post-harvest residues does not include incidental growth on small portions of the confinement area.<sup>11</sup>

Second, the facility must confine the necessary number and type of animals to be classified a CAFO. For horses, there must be 500 horses or more for the facility to be classified as a large CAFO. 40 C.F.R. 122.23(4)(vi). A facility is a medium CAFO if it has 150-499 horses and it either: (1) discharges “into waters of the United States through a man-made ditch, flushing system, or other similar man-made device”; or (2) “[p]ollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.” 40 C.F.R. § 122.23(6).

For facilities smaller than a medium CAFO, the EPA may designate any AFO as a CAFO if it determines that the AFO is a significant contributor of pollutants to waters of the United States. 40

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<sup>8</sup> NPDES Permit Writers' Manual for CAFOs. [https://www.epa.gov/sites/production/files/2015-08/documents/cafo\\_permitmanual\\_chapter2.pdf](https://www.epa.gov/sites/production/files/2015-08/documents/cafo_permitmanual_chapter2.pdf). Accessed April 24, 2017.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

C.F.R. § 122.23. In other words, regardless of the number of animals present at any given facility, the EPA may find that the facility is a significant contributor of pollutants and classify the AFO as a CAFO in need of NPDES permitting coverage. Every discharge of pollutants from a CAFO into waters of the United States without a NPDES permit is a violation of Section 301 of the CWA, 33 U.S.C.A. § 1311.

The requirements of an NPDES permit for a CAFO are the same as those issued to other point sources. The CAFO permit must contain effluent limitations, monitoring and reporting requirements, record-keeping requirements, special conditions, and standard conditions to ensure the CAFO is complying with the CWA.<sup>12</sup> Like all NPDES permits, a CAFO permit must include technology-based effluent limitations (“TBELs”). However, a CAFO permit must also include more stringent water quality-based effluent limitations (“WQBELs”) when such limitations are necessary to meet water quality standards when those standards are not being met. Additionally, all CAFO permits must include a requirement to implement a nutrient management plan (“NMP”), that at a minimum, contains best management practices necessary to meet enumerated requirements and applicable effluent limitations and standards. 40 C.F.R. § 122.42(e)(1). Those enumerated requirements include: (1) manure and process wastewater storage; (2) management of mortalities; (3) diversion of clean water from the production area; (4) prevention of direct contact of confined animals to waters of the United States; (5) chemical and contaminant management of manure, litter, process wastewater, storm water storage or treatment; (6) conservation practices; (7) protocols for testing manure, litter, process wastewater, and soil; (8) protocols for applying manure, litter, or process wastewater in accordance with the site-specific NMP; and (9) record keeping. *Id.* The terms of the NMP are enforceable effluent limitations that must be included in the permit.<sup>13</sup>

CAFOs are also subject to industrial stormwater permitting requirements of 40 C.F.R. § 122.26. This regulation requires operators of facilities subject to storm water permitting that discharge stormwater associated with industrial activities to obtain an NPDES permit.<sup>14</sup> Large CAFOs, as defined in 40 C.F.R. §§ 122.23 and 412, are included as facilities considered engaged in industrial activity under 40 C.F.R. § 122.26(b)(14)(i).<sup>15</sup> Consequently, large CAFOs are subject to regulation of storm water discharges under 40 C.F.R. § 122.26, regardless of whether they are subject to the CAFO requirements under part 122.23. *Id.* Industrial stormwater permit requirements apply to any stormwater discharges associated with industrial activity at a large CAFO that is not otherwise regulated under parts 122.23 and 412. *Id.* To clarify, portions of CAFOs which are not subject to CAFO permit requirements may still be subject to NPDES permit requirements if the CAFO discharges stormwater because CAFOs are defined in regulation as areas of industrial activity under the industrial stormwater permit.

The Stormwater Permit contains discharge prohibitions, effluent limitations, receiving water limitations, requirements for storm water pollution prevention plans (“SWPPPs”), monitoring and reporting programs (“M&RPs”), exceedance response actions (“ERAs”) contingent on a facility’s performance, and annual reporting requirements. Every discharge of stormwater from an area of

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<sup>12</sup> NPDES Permit Writers’ Manual for CAFOs, <https://www.epa.gov/npdes/npdes-permit-writers-manual-concentrated-animal-feeding-operations>, Ch. 4 (Last Accessed May 3, 2017).

<sup>13</sup> *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005).

<sup>14</sup> National Pollutant Discharge Elimination System (“NPDES”) General Permit No. CAS000001, Water Quality Order 2014-0057-DWQ (hereinafter referred to as “Stormwater Permit”), Finding 3.

<sup>15</sup> *Supra* 16, at 4-19.



industrial activity at a CAFO into waters of the United States without industrial stormwater permit coverage is a violation of Section 301 of the Clean Water Act, 33 U.S.C.A. § 1311.

Section 505 of the CWA, 33 U.S.C. § 1365, authorizes citizen enforcement for violations of any effluent standard or limitation in effect under the CWA, including the failure to obtain an NPDES permit. 33 U.S.C. § 1365(f)(5).

#### **4. NOTICE RECIPIENTS' FAILURE TO OBTAIN A CAFO PERMIT**

##### **4.1. The Riding Park is a Large CAFO**

The Riding Park meets the regulatory definition of an Animal Feeding Operation ("AFO"). An AFO is a facility where animals are confined and fed or maintained for a total of 45 days or more in a 12-month period where crops, vegetation, or forage growth are not maintained in the normal growing season. 40 C.F.R. § 122.23. Based upon information submitted by Notice Recipients in the "Notice of Intent to Comply with the Conditional Waivers of Waste Discharge Requirements for Low Threat Discharges in the San Diego Region" (attached hereto as Exhibit A, hereinafter "NOI") submitted by Notice Recipients to the San Diego Regional Water Quality Control Board, in 2016 there were 127 days where horses were present at the Riding Park. There are no crops or forage growth maintained on the property where horses are permitted to graze. As is typical of an equestrian event center such as the Riding Park, horses are confined to stables when on the property. Thus, the Riding Park is an AFO.

Due to the number of horses present at the Riding Park during a 12-month period, the Riding Park also meets the regulatory definition of a large CAFO. As stated above, a large horse CAFO is an AFO with over 500 horses. 40 C.F.R. § 122.23(4)(vi). As reported by Notice Recipients in the NOI, there were 58 days where over 500 horses were present at the Riding Park. (Attached hereto as Exhibit B is an excel spreadsheet that calculates the number of days and number of horses reported by Notice Recipients in Exhibit A.) Based on information available to Coastkeeper, the number of horses reported in 2016 is representative of a typical year of equestrian events at the Riding Park. Thus, the Riding Park is a large CAFO.

Exhibit B illustrates that over the course of 127 days in 2016, there were 8,354 horses at the Riding Park. On the 58 days where more than 500 horses were present at the Riding Park, a total of 5,276 horses were at the Riding Park. The amount of manure and pollutants produced at the Riding Park is a substantial source pollution affecting water quality. Similar to other horse CAFOs, such as racetracks, the Riding Park generates a substantial amount of manure, bedding, and process wastewater, trash, footing, and other pollutants. As a large CAFO, the Riding Park is considered a point source, subject to NPDES Permitting pursuant to Section 402 of the CWA, 33 U.S.C.A. § 1342.

#### **4.2. The Riding Park Does Not Have NPDES Permit Coverage**

The Riding Park does not have the required NPDES permit coverage that would allow the facility to discharge pollutants pursuant to Section 402 of the CWA, 33 U.S.C.A. § 1342. Section 301 of the CWA, 33 U.S.C.A. § 1311, prohibits the discharge of a pollutant from a point source without a permit. The Riding Park is an AFO which confines greater than 500 horses on site for more than 45-days in a 12-month period. As such, the Riding Park is a large CAFO and, by definition, a point source. 33 U.S.C.A. § 1362. A CAFO must be covered by an NPDES permit at the time it discharges. 40 C.F.R. 122.23(f). In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. 40 C.F.R. § 122.23(d)(1). Coastkeeper's investigations failed to yield evidence of an individual CAFO permit for the Riding Park issued by the San Diego Regional Water Quality Control Board and the region has not adopted a NPDES general permit for CAFOs. The lack of a CAFO permit is further evidenced by the Notice Recipients' attempt to obtain Conditional Waiver of Waste Discharge Requirements coverage by filing an NOI for discharges from animal operations. Every day the Riding Park operates without a CAFO permit is a separate and distinct violation of Section 301 of the CWA, 33 U.S.C.A. § 1311.

#### **4.3 Effluent Limitations Applicable to CAFOs**

Pursuant to CWA Section 402, 33 U.S.C.A. § 1342, the state may issue an NPDES permit which authorizes the discharge of pollutants into navigable waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA. If issued, the state is directed to prescribe conditions for NPDES permits to assure compliance with the requirements of the CWA, including conditions on data and information collection, reporting, and other such requirements as the state deems appropriate. Among the conditions and limitations prescribed in the NPDES permits issued under CWA Section 402(a), 33 U.S.C.A. § 1342(a), are effluent limitations. Effluent limitations, as defined in CWA Section 502(11), 33 U.S.C.A. § 1362(11), are restrictions on the quantity, rate, and concentration of chemical, physical, biological, and other constituents of wastewater discharges.

Section 301(b), 33 U.S.C.A. § 1311(b), requires that all NPDES point sources achieve compliance with TBELs. TBELs for CAFOs must address all discharges from a CAFO. 40 C.F.R. § 122.42(e). In general, CAFO permits include limits for process wastewater discharges from the CAFO's production area and land application area. For large horse CAFOs, production area TBELs prohibit all discharges of "process wastewater" to waters of the United States. 40 C.F.R. § 412.13(a). Process wastewater means water directly or indirectly used in operation of the AFO for activities including: washing, cleaning, or flushing AFO facilities; washing or spray cooling animals; dust control; or any water that comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, or bedding. 40 C.F.R. § 122.23(b)(7); 40 C.F.R. § 412.2(d). The discharge of process wastewater is permissible only when rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source. 40 C.F.R. § 412.13(b). Coastkeeper is informed and believes, and thereon alleges, Notice Recipients' activities at the Riding Park resulted in the discharge of process wastewater to waters of the United States directly and indirectly from each onsite wash rack, as evidenced by photographs taken by Coastkeeper investigators on May 3, 2017. *See* Exhibit C. Further, Coastkeeper alleges the Riding Park discharges process

wastewater during dry weather and wet weather events below a 25-year, 24-hour rainfall event, in violation of the TBEL.

Land application discharges from a CAFO are also subject to NPDES permitting. 40 C.F.R. § 122.23(e). The discharge of process wastewater to waters of the United States from a CAFO as a result of the application of process wastewater by the CAFO to land areas under its control is a discharge subject to NPDES permit requirements, except when applied in accordance with a site-specific NMP. *Id.* Coastkeeper is informed and believes, and thereon alleges, that Notice Recipients use process wastewater for dust control throughout the site and without a NMP. This process wastewater discharges to waters of the United States, specifically onsite jurisdictional waters, in violation of TBELs and Section 301 of the Clean Water Act, 33 U.S.C.A. § 1311.

#### **4.4. The Riding Park Discharges Pollutants into Waters of the United States**

Coastkeeper is informed and believes that pollutants from the Riding Park have been and are continually discharged to San Juan Creek and onsite jurisdictional waters. Pollutants include but are not limited to horse manure, bedding, sediment, equine footing, trash, and other pollutants associated with equine operations. Coastkeeper is further informed that the Riding Park has stormwater and non-stormwater discharges of pollutants into San Juan Creek and jurisdictional waters are ongoing and continuous. During rain events, rain falls onto the Riding Park and runs through the stable and manure areas towards San Juan Creek. Stormwater comes into direct contact with manure and bedding from the stables, which have only dirt floors and temporary walls. Water then flows towards the southwest into San Juan Creek, taking along with it pollutants such as phosphorus, nitrogen, trash, and bacteria.

During the equestrian event season, pollutants are also discharged from the facility in dry weather. For example, process wastewater from the horse wash rack stations regularly escape the wash racks and the infiltration basin, eroding the creek bed and discharging process wastewater into the creek. Some wash racks are located no more than five feet from the creek bank. Other pollutants, such as plastic cups, food wrappers, plastic and glass bottles, paper plates, equine medicine applicators, feed bags, and other forms of trash blow into the creek or are deliberately dumped there by invitees of the Riding Park. Dumpsters are kept next to the creek and piled high with light trash, such as feed bags, enabling light breezes to carry trash to the creek. Coastkeeper's investigators have observed piles of manure and used bedding that have been pushed into the creek bank. Coastkeeper's investigators have also observed water trucks discharging process wastewater onto and near exhibition rings. We have observed and documented drains under the exhibition rings discharge into onsite jurisdictional waters during dry weather events. Coastkeeper is informed and believes that there are various other discharges of pollutants not specifically mentioned herein for which Notice Recipients are liable. Each discharge of a pollutant into waters of the United States without a CAFO permit is a violation of Section 301 of the CWA, 33 U.S.C.A. § 1311.

**5. NOTICE RECIPIENTS' FAILURE TO OBTAIN STORMWATER PERMIT COVERAGE**

**5.1 The Riding Park Includes Areas of Industrial Activities**

In California, owners and/or operators of any facility with industrial activities described in Attachment A of the Stormwater Permit are required to obtain permit coverage prior to discharging to waters of the United States.<sup>16</sup> Information available to Coastkeeper indicates the Riding Park includes at least one fenced building where industrial activities including metal welding, metal work and repair, waste and recyclable metal management, metal storage, and vehicle maintenance occur. Most, if not all, of the industrial activities occur outside and without significant cover. Some activities, including horse-related industrial activities involving metalwork, are performed at remote locations onsite away from the building. Pollutants associated with these activities, include but are not limited to: pH-affecting substances; metals, such as iron and aluminum; toxic metals, such as copper, lead and zinc; TSS; gasoline and diesel fuels; fuel additives; coolants; trash; specific conductance affecting substances; nitrate as nitrogen; and oil and grease. Coastkeeper is informed and believes, and thereon alleges, Notice Recipients are required to obtain Stormwater Permit coverage for those portions of the Riding Park where industrial activities described in Attachment A are taking place. Each discharge of pollutants from the Riding Park to waters of the United States without Stormwater Permit coverage is a violation of Section 301 of the Clean Water Act, 33 U.S.C.A. § 1311.

**5.2 The Riding Park does not have Stormwater Permit Coverage**

In California, the owners and/or operators of any facility that discharges storm water associated with industrial activities, as defined in 40 C.F.R. § 122.26, to waters of the United States must first obtain coverage under the Stormwater Permit. *See* 33 U.S.C.A. §§ 1311, 1342; 40 C.F.R. § 126.26(c)(1); Stormwater Permit, Discharge Prohibition A. The Stormwater Permit regulates industrial storm water discharges from specific categories of industrial facilities identified in Attachment A, which includes CAFOs. Stormwater Permit, Attachment A.1; 40 C.F.R. Part 412. Separate from the CAFO related industrial activities, the Riding Park's maintenance and metal repair activities are industrial activities covered under the Stormwater Permit. Consequently, since the Riding Park facility is a CAFO and engaged in industrial activities, the Notice Recipients must obtain coverage under the Stormwater Permit unless they are regulated by a separate individual or general NPDES permit. *See* 33 U.S.C.A. §§ 1311, 1342; 40 C.F.R. § 126.26(c)(1); Stormwater Permit, Discharge Prohibition A. Coastkeeper is informed and believes, and thereon alleges that the Riding Park has not been enrolled under the Stormwater Permit by the Notice Recipients. Information available to Coastkeeper indicates the Riding Park has illegally discharged storm water into waters of the United States during every measureable rain event since May 4, 2012. *See* Attachment D. Information available to Coastkeeper indicates the Riding Park continues to discharge non-stormwater from industrial areas. *See* Attachment C.

By failing to obtain Stormwater Permit coverage and comply with the requirements of the Stormwater Permit, including SWPPP and M&RP requirements, the Notice Recipients have violated the Stormwater Permit and the Clean Water Act. *See* 33 U.S.C.A. §§ 1311, 1342; 40 C.F.R. §§ 122.26(c)(1), 122.41(a); Water Quality Order No. 97-03-DWQ, Section C.1; Stormwater Permit, Standard Condition

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<sup>16</sup> Stormwater Permit, Finding 9.

A. Discharges of non-stormwater and stormwater from areas of industrial activity to waters of the United States from the Riding Park are ongoing and continuous, having occurred since at least May 4, 2012, in violation of the Stormwater Permit and Section 301 of the Clean Water Act, 33 U.S.C.A. § 1311.

**6. CONCLUSION**

In addition to the violations set forth above, this Supplemental Notice Letter covers all violations of the Clean Water Act by the Notice Recipients as evidenced by information that becomes available to Coastkeeper after the date of this Supplemental Notice Letter. Specifically, Coastkeeper puts the Notice Recipients on notice that it intends to include all violations of the CWA in its federal citizen enforcement suit.

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (1997), each separate violation of the Clean Water Act subjects the violator of a penalty of up to \$37,500.00 per day per violation for all Clean Water Act violations after January 12, 2009 and \$51,570.00 per day per violation for violations that occurred after November 2, 2015. In addition to civil penalties, Coastkeeper will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and other such relief as is permitted by law. Lastly, Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs and fees.

Coastkeeper has retained legal counsel to represent them in this matter. All communications concerning this notice should be addressed to:

Jennifer F. Novak  
Law Office of Jennifer F. Novak  
500 Silver Spur Road, Suite 206  
Rancho Palos Verdes, California, 90275

During the 60-day notice period, Coastkeeper would like to discuss effective remedies with the Notice Recipients to address the violations noted in this Supplemental Notice. If the Notice Recipients wish to pursue such discussions, we suggest that it initiate those discussions immediately. At the close of the 60-day notice period, Coastkeeper intends to move forward with litigation to prevent ongoing violations of the Act.



Supplemental Notice of Violation and Intent to File Suit  
May 4, 2017  
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Coastkeeper further intends to file its initial complaint at the end of the notice period for the First Notice Letter sent on March 31, 2017 for the claims noticed therein barring a settlement prior to that date. Coastkeeper will amend its complaint for the claims noticed herein at the end of the 60-day notice period.

Regards,

A handwritten signature in black ink, appearing to read "Colin Kelly", written over a horizontal line.

Colin Kelly  
Senior Staff Attorney  
Orange County Coastkeeper

cc: (see attached service list)

**SERVICE LIST**

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